

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CAPELLO *et al.*,

Plaintiffs,

v.

SELING, *et al.*,

Defendants.

Case No. C02-5242RBL

REPORT AND  
RECOMMENDATION  
REGARDING  
DARIN DILLINGHAM

**NOTED FOR:  
JULY 14<sup>th</sup>, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is a summary judgment motion filed by defendants. This Report and Recommendation deals only with the claims of Darin Dillingham.

PROCEDURAL HISTORY

Defendants filed a large number of summary judgment motions during July of 2004. The dispositive motion cut off date was July 30<sup>th</sup>, 2004. (Dkt. # 195). The motions were supported by a general brief and declarations. (Dkt. # 229 and 230 through 242). On July 28<sup>th</sup>,

1  
2 2004, defendants filed a memorandum specific to Mr. Dillingham. (Dkt. # 330). The  
3 memorandum and attached declarations addressed the mental health treatment available and  
4 issues specific to Mr. Dillingham. (Dkt. # 330 and 331).

5 Plaintiffs filed a single response to all the summary judgment motions. (Dkt. # 404).  
6 While the court had authorized each plaintiff to file an over length brief, the court did not  
7 authorize the filing of this document which contained over one thousand pages of briefing and  
8 materials.

9 Plaintiff supports his response with a number of declarations. (Dkt. # 405 through 421).  
10 Plaintiff also submits his own declaration. (Dkt. # 414). Defendants reply and note that none of  
11 the information provided by plaintiff creates a genuine issue of material fact that implicates any  
12 named defendant in this action. (Dkt. # 396).

### 13 FACTS AND CLAIMS

14 This action is one in a series of legal actions regarding the Special Commitment Center  
15 (SCC). Plaintiffs challenge the mental health treatment provided and conditions of confinement.  
16 The plaintiffs are all persons confined for mental health treatment. The SCC is designed to treat  
17 persons whose mental abnormalities or personality disorders make them likely to engage in  
18 predatory acts of sexual violence. (Dkt. # 229, page 3).

19 For over a decade the SCC operated under federal oversight as a result of injunctions  
20 issued by the United States District Court in Seattle. In 1991 the court found conditions of  
21 confinement unconstitutional and found the mental health treatment offered inadequate. Turay  
22 v. Seling, C91-0664RSM. On June 19<sup>th</sup>, 2004 the court found the defendants in substantial  
23 compliance and lifted the injunctions with one exception. Turay v. Seling, C91-0664RSM (Dkt  
24 # 1906).

25 This plaintiff, Mr. Dillinham, was sent to the SCC as a pre-trial detainee in November of  
26 2000. He had not been committed and was still awaiting trial in July of 2004. (Dkt. # 330,  
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1  
2 page 2).

3 Mr. Dillingham's working diagnosis includes "Paraphilia (Pedophilia) and Antisocial  
4 Personality Disorder. (Dkt. # 331-2, Declaration of Jason Dunham, Ph.D., page 8).

5 Dr. Dunham, in his declaration, states that in his professional opinion the treatment  
6 available to plaintiff provides plaintiff with an opportunity to improve the conditions for which  
7 he is committed. (Dkt. # 331-2). The Plaintiff has not contradicted the factual representations  
8 or assertions made by defendants.

9 Mr. Dillingham participated in treatment for approximately six months and then  
10 withdrew from treatment with the exception of one on one sessions. (Dkt. # 330, page 3). Mr.  
11 Dillingham stated the decision not to be in treatment was his and that he is waiting for the court  
12 system. (Dkt. # 330, page 3). Mr. Dillingham is housed in a unit for persons who are unwilling  
13 to be in treatment.

14 Defendants' motion for summary judgement is very specific. Defendants seek summary  
15 judgment because the complaint does not "accurately represent each plaintiff's claims, and  
16 because **each plaintiff must demonstrate the merit of his own claims to go forward.**" (Dkt.  
17 # 229)(emphasis added). Defendants ask for summary judgment based on the Eleventh  
18 Amendment, qualified immunity, personal participation, and lack of a constitutional violation.  
19 (Dkt. # 229, pages 18 through 37). In essence, defendants argue that none of the plaintiffs can  
20 show an injury of constitutional magnitude specific to that plaintiff.

21 In his deposition and his response to the motion for summary judgment Mr. Dillingham  
22 raises a number of issues relating to conditions of confinement at the new facility. (Dkt # 330,  
23 Exhibit 1, Deposition of Darin Dillingham, and Dkt. # 414, Declaration of Darin Dillingham).  
24 Mr. Dillingham does not implicate any named defendant in either his deposition or his  
25 declaration. Further, while plaintiff expresses his opinions regarding treatment at the SCC he  
26 provides no evidence to show the treatment offered him is inadequate. (Dkt. # 414).

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2 Plaintiff's argument that individualized therapy or treatment can only occur in one on  
3 one treatment is simply not supported by any admissible evidence. Defendants reply and note  
4 that Mr. Dillingham's opinion regarding the adequacy of treatment, unsupported by expert  
5 testimony, does not create a genuine issue of material fact. (Dkt. # 396). Defendants  
6 systematically address each issue raised by Mr. Dillinham in either his declaration or his  
7 deposition and show there is no genuine issue of fact precluding summary judgment. (Dkt. #  
8 396).

9 Mr. Dillingham provides no facts to show that defendants personally participated in any  
10 constitutional violation. Plaintiff places great weight on the findings of fact made in Turay v.  
11 Seling, and other cases without a showing that the findings apply to him. Thus, Mr. Dillingham  
12 continues to argue this action in the abstract. By way of example, he argues damages are "best  
13 weighed by everyday spent without constitutionally adequate mental health treatment and more  
14 considerate conditions of confinement than prisoners." (Dkt. # 404 page 6). Plaintiff has no  
15 evidence to support his assertions that the treatment offered him is in any way inadequate.  
16 Plaintiff's response does not meet the requirement of a specific evidentiary showing.

#### 17 THE STANDARD

18 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the  
19 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
20 affidavits, if any, show that there is no genuine issue of material fact and that the moving party  
21 is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The moving party is entitled  
22 to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on  
23 an essential element of a claim on which the nonmoving party has the burden of proof. Celotex  
24 Corp. v. Catrett, 477 U.S. 317, 323 (1985).

25 There is no genuine issue of fact for trial where the record, taken as a whole, could not  
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1 lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v.  
2 Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific,  
3 significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ.  
4 P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
5 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions  
6 of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service  
7 Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

8 The determination of the existence of a material fact is often a close question. The court  
9 must consider the substantive evidentiary burden that the nonmoving party must meet at trial,  
10 e.g. the preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W.  
11 Elec. Service Inc., 809 F.2d at 630. The court must resolve any factual dispute or controversy  
12 in favor of the nonmoving party only when the facts specifically attested by the party contradicts  
13 facts specifically attested by the moving party. *Id.*

14 The nonmoving party may not merely state that it will discredit the moving party’s  
15 evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W.  
16 Elec. Service Inc., 809 F.2d at 630.(relying on Anderson, *supra*). Conclusory, nonspecific  
17 statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” Lujan v.  
18 National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

19 In addition, the court is mindful that an action for injunctive relief focuses on whether  
20 the combined acts or omissions of state officials violate a constitutional right or duty owed the  
21 plaintiff. In contrast, when a plaintiff seeks to hold a defendant personally liable the inquiry into  
22 causation is more specific and focuses on that persons specific actions. Leer v. Murphy, 844 F.  
23 2d. 628, 632 (9th Cir. 1988).

## 24 DISCUSSION

1 The plaintiffs' reliance on Turay is misplaced. The holdings do not equate to findings of  
 2 liability for damages against any named defendant because of the difference in standards of  
 3 proof between actions for injunctive relief and actions for damages. This difference was briefed  
 4 by defendants who stated:

5 As Judge Leighton explained in a similar case: "Turay has no talismanic  
 6 quality, the mere invocation of which conjures a cause of action." Hoisington, et  
 7 al. v. Seling, et al., No. C01-5228-RBL, October 28, 2003, Order at 6 (dkt. #  
 8 189). Turay is of assistance to plaintiffs in this case only if (1) they are able to  
 9 identify a specific ruling from Turay that, for qualified immunity purposes, was  
 10 sufficient to put defendants on notice that their conduct potentially violated  
 11 plaintiffs' constitutional rights; or (2) they can point to a specific factual finding  
 12 from Turay that could apply by way of collateral estoppel. In either case, each  
 13 plaintiff must first show how a specific ruling or finding from Turay applies to his  
 14 situation and establishes a violation of his constitutional rights. In doing so, each  
 15 plaintiff must be aware that relief ordered in Turay does not represent the  
 16 constitutional minimum. See Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir.  
 17 2000) ("A court may order 'relief that the Constitution would not of its own  
 18 force initially require if such relief is necessary to remedy a constitutional  
 19 violation.'"). In Sharp, the Ninth Circuit specifically noted that Judge Dwyer's  
 20 findings in Turay did not imply the existence of constitutional rights. Thus, for  
 21 example, Judge Dwyer's order that SCC provide residents private visitation  
 22 rooms and educational opportunities did not mean that the residents had a  
 23 constitutional entitlement to those things. *Id.*

24 (Dkt. # 229, pages 21 and 22).

25 The defendants filed a separate motion for summary judgment for each plaintiff that sets  
 26 forth the treatment provided or available to that person and that persons factual history. The  
 27 summary judgement standard requires a plaintiff to "present specific, significant probative  
 28 evidence." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

29 Mr. Dillingham was informed of the summary judgment standard. (Dkt. # 195). The  
 30 court specifically informed plaintiff that if the opposing party moved for summary judgment he  
 31 would need to:

32 **[s]et out specific facts in declarations, deposition, answers to**  
 33 **interrogatories, or authenticated documents, as provided in Rule 56(e), that**  
 34 **contradict the facts shown in the defendant's declarations and documents**  
 35 **and show that there is a genuine issue of material fact for trial. If you do**  
 36 **not submit your own evidence in opposition, summary judgment , if**  
 37 **appropriate, may be entered against you. If summary judgment is granted,**

1        **your case will be dismissed and there will be no trial.** Rand v. Rowland, 154  
2        F.3d 952, 962-963 (9th Cir. 1998)(emphasis added).

3        (Dkt. # 195). (emphasis in original order). Mr. Dillingham has failed to come forward with any  
4        evidence to show that any right or duty owed to him has been violated by any named defendant.  
5        His allegations in the complaint are unsupported by any evidence that shows he has suffered any  
6        constitutional injury.

7        Plaintiff complains about a number of issues without providing any evidence to show  
8        any named defendant played any part in the alleged conduct. These issues range from how the  
9        doors in the new facility work to denture cleaning supplies. (Dkt. # 414). He complains about  
10       medical care and recreation, but defendants show plaintiff received medical treatment when he  
11       was injured playing basketball and he receives constitutionally adequate recreation  
12       opportunities. With regard to mental health treatment, plaintiff's refuses treatment with the  
13       exception of one on one sessions. Plaintiff has not shown any constitutional violation regarding  
14       the conduct of any named defendant.

15       While he complains of his treatment he has not shown either personal participation or  
16       injury. He does not substantiate any allegation that a named defendant in this action ever denied  
17       or delayed medical or dental treatment. The same analysis is true for the remaining claims.  
18       There is simply no evidence that implicates any named defendant. Defendants are entitled to  
19       summary judgment based on this plaintiff's lack of evidence that he was subjected to any  
20       unconstitutional condition attributable to the actions of any named defendant. The defendants  
21       are entitled to summary judgment as a matter of law.

#### 22        CONCLUSION

23        Defendants are entitled to summary judgment as plaintiff has failed to show a  
24        any injury. Defendants motion for summary judgment should be **GRANTED**. A proposed order  
25        and proposed judgment accompanies this Report and Recommendation.

26        Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil

1 Procedure, the parties shall have ten (10) days from service of this Report to file written  
2 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
3 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
4 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
5 **July 14<sup>th</sup>, 2006**, as noted in the caption.

6 DATED this 14<sup>th</sup> day of June, 2006.  
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12 Karen L. Strombom  
13 United States Magistrate Judge  
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